Supreme Court, U.S.
FILED
SEP 19 1987
JOSEPH F. SPANIOL, CLERK

No. 87-356

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

JOE BEN COLLEY, PETITIONER

V.

NATIONAL BANK OF TEXAS, RESPONDENT
AND
WEST TEXAS WHOLESALE SUPPLY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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JOINDER OF CASES AND PARTIES

In Petitioner's opening statement on the first page of his petition, he seeks review of two separate opinions of the Court of Appeals. Respondents herein have no objection to such joinder, believing it to be appropriate in view of the identity of legal issues.

QUESTION PRESENTED FOR REVIEW

Petitioner has asserted that the question is whether the Memorandum Opinion and Order prepared by the United States Bankruptcy Judge conformed to Bankruptcy Rule 9021 providing for the judgment to be written on a separate documents from a written opinion. That is not really the issue here. Unquestionably, the rule contemplates two separate documents. The issue here is whether Petitioner may maintain an appeal on such ground in the face of the fact

finding of the courts below that the parties all waived any such objection to any such defect. However, this question need not even be reached since the appeals in these cases were not taken from such combined Memorandum Opinion and Order, but rather were appeals taken from two separate Orders denying Motions for Reconsideration, each of which orders fully met the separate document requirement of Bankruptcy Rule 9021.

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OPINIONS OF COURT OF APPEALS

The primary opinion of the Court of Appeals is accurately reproduced in the Appendix to Petitioner's Brief. However, the opinion of the Court of Appeals on Motion for Rehearing is not accurately reproduced, omitting significant parts. A true copy of the opinion on Motion for Rehearing is appended hereto.

STATEMENT OF THE CASE

Petitioner's statement is mostly correct, until he gets to his interpretation of the opinions of the Court of Appeals for the 5th Circuit.

Petitioner mistakenly argues that the Court of Appeals operated on the premise that the Memorandum Opinion and Order of May, 1985 was the only document from which appeal was taken. As is clear from the opinions of the Court of Appeals, that Court recognized that these appeals were taken from the Orders denying Petitioner's Motions for Reconsideration. The Court of Appeals simply recognized in its opinions that even if there had been an appeal from the May, 1985 Memorandum Opinion and Order rather than from the Orders denying Motions for Reconsideration, the result would have been the same.

REASONS TO DENY PETITION FOR WRIT OF CERTIORARI

Petitioner's sole allegation is that Certiorari should be granted because the Bankruptcy Court rendered a joint Memorandum Opinion and Order in May, 1985 which failed to comply with the separate document requirement of Bankruptcy Rule 9021. There is no doubt that the joint opinion and order did fail to comply with that rule. There are, however, two independent reasons why such is not determinative of any issue between the parties at this time and why that defect is not before the Court for adjudication:

1. The actual appeals were from two Orders denying Motions for Reconsideration entered on December 5, 1985 and January 20, 1986. These orders were final orders which met the separate document requirement.

2. Even if Colley had taken an appeal from the original Memorandum Opinion and Order of the U.S. Bankruptcy Court, he waived the separate document requirement and may not now rely upon it.

The Bankruptcy Judge denied Colley's Motion To Reconsider the National Bank of Texas claim on December 5, 1985. The Bankruptcy Judge denied the Motion to Reconsider the claim of West Texas Wholesale Supply on January 30, 1986. These dates and events are confirmed on page 9 of Petitioner's Brief. These orders and denials clearly met the requirement of Bankruptcy Rule 9021 that "Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document." These are the only orders from which any appeal was ever taken. These were affirmed without opinion by the District Court.

These were affirmed by the Court of Appeals which held that the District Court operated properly within its discretion to deny reconsideration and that Colley, as Petitioner, had not adequately raised proper grounds for reconsideration. The further holdings and ruling are contained in the Opinion of the Court below which is part of the Appendix. Recognition of these uncontested procedural historical facts should be sufficient to completely dispose of this appeal and require refusal of Certiorari.

The second and independent reason why there can be no Certiorari in this case is that even if the appeal had been taken from the original combined opinion and order of the Bankruptcy Court, no party ever objected to the failure of that Court to put the opinion on a sep rate page from the order. This waiver and

failure to object is apparent on the face of the record, as expressly determined by the Court of Appeals for the reasons set forth in its opinion on Motion For Rehearing, copy of which is appended hereto.

Petitioner appears to misread the opinion of the court below and to also misread the opinion of this Court in Bankers Trust Co. v. Mallis, 435 U.S. 381, 98 S.Ct 1117, 55 L.Ed.2d 351 (1978). The opinion of the Court of Appeals shows a holding that by moving for reconsideration and subsequently appealing on that denial, rather than requesting that the Bankruptcy Court enter a separate entry of a separate judgment on the original Memorandum Opinion and Order, Colley waived his right to obtain a separate judgment. That factual determination of waiver, based upon the record in the case, is

final. The opinion of the Honorable United States Supreme Court in Mallis, makes quite plain that parties can waive the procedural requirement of the "separate document" rule. The Mallis opinion also indicates that in a case where the trial judge intends the opinion and order to be the final decision and the parties do not object that such lack of objection amounts to a waiver. That clearly is the situation in the case now before this Court. In such cases, it is clearly proper for the appellate court to rule on the merits despite the lack of a separate judgment. Diamond v. McKenzie, 770 F2d 225 (D.C.Cir. 1985). Accord, Hanson v. Town of Flower Mound, 679 F2d 497 (5th Cir. 1982).

A reading of the Memorandum Opinion and Order of the Bankruptcy Court makes it abundantly clear that the Judge

intended it to be a final judgment. No party objected. All parties acquiesced and none requested any separate judgment. Petitioner Colley treated it as a final judgment by filing Motions for Reconsideration.

CONCLUSION

Whether the appeal is considered to be from the adverse rulings on the Motions for Reconsideration or from the original Memorandum Opinion and Order, the result is the same. The Court of Appeals has correctly held that there can be no further appeal. Certiorari should be DENIED.

RESPECTFULLY SUBMITTED.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 18th day of September, 1987, three copies of Respondents' Brief in Opposition to Petition for Writ of Certiorari were mailed, First-Class U.S. Mail postage prepaid, to each of the following attorneys: B. Weldon Ponder, Jr., 1000 Capitol Center, 919 Congress Avenue, Austin, Texas 78701, counsel for National Bank of Texas; and Eric R. Borsheim, 910 West Avenue, Austin, Texas 78701, counsel for Petitioner. I further certify that all parties required to be served have been served.

Don L. Baker

DON L. BAKER

In the Matter of Joe Ben COLLEY, Debtor.

Joe Ben COLLEY, Plaintiff-Appellant,

v.

WEST TEXAS WHOLESALE SUPPLY, Defendant-Appellee.

In the Matter of Joe Ben COLLEY, Debtor.

Joe Ben COLLEY, Plaintiff-Appellant,

v.

NATIONAL BANK OF TEXAS, Defendant-Appellee.

Nos. 86-1625, 86-1626.

United States Court of Appeals, Fifth Circuit.

June 8, 1987.

Debtor moved for reconsideration of bankruptcy court order allowing certain creditors' claims. The Bankruptcy Court denied motion. Debtor appealed. The United States District Court, Western District of Texas, James R. Nowlin, J., affirmed. Debtor appealed. The Court of Appeals, 814 F.2d 1008, affirmed. Debtor petitioned for rehearing. The Court of Appeals held that by moving for reconsideration and appealing based on denial of the reconsideration motion, debtor waived his right to separate judgment, and thus, to review on the merits of underlying order allowing the claims.

Petitions denied.

1. Bankruptcy ⇐11(3)

Sole purpose of bankruptcy rule requiring that every judgment be set forth on separate document is to definitively establish when time for appeal begins to run. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.; Rules Bankr.Proc.Rule 9021, 11 U.S.C.A.

2. Bankruptcy ⇐11(3)

Bankruptcy rule requiring that every judgment be set forth on separate document can be waived. Fed.Rules Civ.Proc. Rule 58, 28 U.S.C.A.; Rules Bankr.Proc. Rule 9021, 11 U.S.C.A.

3. Bankruptcy ⇐442

Debtor, who moved for reconsideration of bankruptcy court order allowing certain creditors' claims, who did not seek entry of separate judgment on the order nor file notice of appeal based on separate judgment, but who based his appeal to the District Court and the Court of Appeals on denial of his motion for reconsideration, waived his right to separate judgment, and thus, to review on the merits of the underlying order. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.; Rules Bankr.Proc.Rule 9021, 11 U.S.C.A.

Appeals from the United States District Court for the Western District of Texas.

ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 17, 1987, 5th Cir., 1987, 814 F.2d 1008)

Before GEE, REAVLEY, and JONES, Circuit Judges.

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PER CURIAM:

In his Petitions for Rehearing, Colley again asserts that Bankruptcy Rule 9021 and Federal Rule of Civil Procedure 58 require us to consider his appeal on the merits, because the judgment of the bankruptcy court allowing the claims of West Texas Wholesale Supply and National Bank of Texas was never embodied in a separate judgment. Once more, we decline to do so.

[1] The sole purpose of the separate document rule is to definitively establish when the time for appeal begins to run. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978). No such issue of timeliness exists in this case. Colley could have asked for the entry of a separate judgment in the bankruptcy court and filed an appeal from that judgment within 30 days. Instead, he chose to move for 11 U.S.C. § 502(j) reconsideration by the bankruptcy court, and has based his appeal to the district court and now this court on the denial of that motion. Both our opinion and that of the district court are framed in terms of this denial of reconsideration. It was not until shortly before oral argument that Colley, in a supplemental brief to this court, decided that his appeal was really on the merits of the underlying bankruptcy court order.

[2, 3] It is clear that the separate document requirement can be waived. *Bankers Trust Co. v. Mallis*, 435 U.S. at 387, 98 S.Ct. at 1121; *Hanson v. Town of Flower Mound*, 679 F.2d 497, 502 (5th Cir.1982). By moving for reconsideration under § 502(j) and appealing to the district court and this court based on the denial of that motion, rather than seeking the entry of a separate judgment on the prior Memorandum Opinion and Order and filing a notice of appeal based on it, Colley has waived his right to a separate judgment and therefore to review on the merits of the underlying order. For us to hold otherwise would mean that Colley could now return to the bankruptcy court, demand the entry of a separate judgment, file a new notice of appeal based on it, and thus further prolong a dispute that is already over seven years old.

The petitions for rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

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